## Strict Liability in the Criminal Law

In almost any hornbook on criminal law, you will find a statement to the ~~fact~~ EFFECT that, with very few exceptions, a "vicious mind" or a "guilty intent" is a prerequisite to a finding of criminality and the imposition of punitive sanctions. But there is widespread opinion among legal commentators today that the trend of recent developments in the criminal law is towards dispensing with the requirement of fault, and these writers point to the multiplication of so-called "strict liability" statutes as illustrative of this trend. These statutes are universally criticized for failing to conform to any of the aims of the criminal law. Whether the basis of criminal law is regarded as retributive, deterrent, rehabilitative, or some combination of these, the imposition of criminal liability in the absence of fault, these writers argue, serves none of these ends. These objections raise two questions:

First of all, do those statutes which are commonly referred to as strict liability statutes in fact impose liability without fault? That is, is the term strict liability a misnomer? Secondly, to the extent that such laws do impose punitive sanctions on individuals who are "without fault", is there a legitimate place for them within the framework of the criminal law?

Before considering these questions, I want to set out some commonly cited examples of strict liability statutes. The usual examples fall into two categories which are distinguished by the character of the sanction imposed by the statute.

The first category includes those statutes which provide for imprisonment of the offender. Examples here include: conviction for statutory rape when a reasonable belief that the victim was over age is not allowed as a defense (Regina v. Prince); conviction under some versions of the felony-murder rule; conviction under a statute imposing liability on a bank director for borrowing an excessive amount from his own bank when a reasonable belief that the money came from another bank is not allowed as a defense (State v. Lindberg); conviction for sale of narcotics in the absence of knowledge that the substance sold was a "narcotic" under the statute (U.S.v. Balint).

The second category is distinguished by the fact that the sanctions provided are limited to the imposition of a fine. Examples of these include many traffic offenses, some misbranding offenses, and many offenses involving violations of safety regula-

tions, health ordinances, and the like.

The first question is, what is meant by "strict liability"? Strict liability can be defined as liability in the absence of moral fault, but this merely raises the question, what is meant by "moral fault"?

Wasserstrom[1] believes that a finding of "fault" is necessary to conviction under the usual strict liability statutes. He takes the case of State v. Lindberg in which a bank officer was convicted for borrowing excessive amounts from his own bank in violation of a Washington statute; the defendant was not allowed to raise the defense that he reasonably believed that the money came from other banks. In support of his argument that most strict liability statutes do require "fault", Wasserstrom asks us to imagine a statute providing that, if a bank director borrows excessively from his own bank, then the director of any other bank shall be imprisoned. Wasserstrom goes to say:

> If the notion of fault requires that there be some sort of causal relationship between the accused and the act in question, it is arguable that the Lindberg case takes account of such a relationship. The defendant in the Lindberg case by virtue of his position qua officer of the bank had considerable control over the affairs of that bank. And he had even greater control over his own borrowing activities. If the element of control is sufficient to permit some kind of causal inference as to events occuring within that control, then a finding of fault in this sense does not seem arbitrary in the

---

1. Wasserstrom, "Strict Liability in the Criminal Law", 12 Stan. L. Rev. 731.

same manner in which a finding of fault in the hypothetical clearly would be. [2]

Is this a legitimate use of the word "fault"? The word is used in many contexts. When the burglar alarm goes off for no reason in the middle of the day, the shopowner might explain that this is a result of a fault in the alarm system - referring to a poor timing mechanism or some other defect. But when he says this, he is not just making a statement about the characteristics of the alarm system, he is also making a comparative statement. His statement would be meaningless to you unless you and he shared some notion about the standard functioning of most alarm systems.

But this is also true of "fault" when it is used in the context of human conduct. For example, Victim says to Driver, "The accident was your fault; if you had had your brakes checked every few thousand miles, you would have learned that they weren't in a safe condition; and you were at fault in failing to have them checked." In making this statement, Victim is not merely saying that Driver didn't have his brakes checked, he is saying further that not having one's brakes checked fails to conform to a standard of conduct that Driver could have and ought to have observed. In this sense the use of the word "fault" is like the use of the word "negligent"[3]; both are intrinsically comparative terms.

---

2. Ibid, p. 743.

3. See Hart, "Negligence, Mens Rea and Criminal Responsibility", in Oxford Essays in Jurisprudence (Editor: A.G.Guest).

Wasserstrom's notion of fault implies that we can say that someone is at fault if he fails to conform to a standard of perfection - that is, when he is the cause of any harm which he had the ability to prevent. Thus he says the purpose of strict liability statutes is often to pick out certain exceptionally risky activities and hold people to an absolute duty to prevent harmful consequences that might result from engaging in these activities.

But when we say that someone is at fault in conducting himself in a particular way, we are rarely, if ever, saying that he fails to conduct himself in a way which conforms to such an absolute standard. A man who did conform to such an ideal would be one of Urmson's "saints" or "heroes".[4] Urmson points out that there are many situations in which we do not feel that we have the right to criticize the conduct of others; in these situations we praise the actor for his exceptional conduct, but if he had failed to conduct himself as he did, we would not have said that he was at fault. A saint or hero is one who either (1) does his duty in circumstances where most other people would not because of fear or self-interest, or (2) goes beyond his duties by performing some act which no one considered incumbent on him to perform. An example of the former is the case of the doctor who remains in a plague-ridden town; an example of the latter is the doctor from some other part of the world who volunteers to come into the town to provide his services. In neither of these cases would we nor-

---

4. Urmson, "Saints and Heroes", in Essays in Moral Philosophy (Editor: Melden).

mally consider the doctor's conduct blameworthy.

Thus when we use the word "fault" in the context of morality, we aren't referring to an ideal standard but to a standard which is something less than one of perfection. We criticize conduct only when it fails to meet a standard which focuses upon what we expect ~~of~~ ordinary men to do in a given set of circumstances. Thus Hart defines "strict liability" statutes as those imposing "punishment for harm which no exercise of reasonable care on the part of the [actor] could have avoided."[5]

If this definition of strict liability is accepted, which of the examples offered earlier do in fact fall under this definition? First of all, take the category of offenses for which the sanction is merely a relatively small fine. In many of these cases there will be no failure to conform to reasonable standards of care, but this won't be allowed as a defense. But since these statutes do not really impose criminal liability in the sense that the distinctive element of such liability - punishment with moral condemnation - is absent, they are not instances of the imposition of criminal sanctions in the absence of fault, and so should not be subject to evaluation on the basis of a principle which was designed to further the ends of the criminal law.

There are difficult cases here, however, as is shown by the

---

5. Hart, op.cit., p. 29. for another concept of strict liability, see Wootton, Crime and the Criminal Law. Lady Wootton regards strict liability as liability imposed in the absence of mens rea, but she uses "mens rea" in such a way as to exclude negligence. She argues in favor of strict liability, but her argument and examples are based on the need to bring negligence in to the criminal law.

example of the shopkeeper convicted of price discrimination. The statute may merely impose a small fine, but the community may, upon hearing of the conviction, increase the penalty by refusing to patronize the store. Offenses which do result in such community condemnation are more properly treated within the second category of strict liability offenses.

What of those statutes which do provide for imprisonment as a sanction? Are these true strict liability statutes? There are two ways in which the actor's mental state may be deficient here. First of all, he may not be aware that a standard of conduct has been embodied in a legal norm - what is commonly called a mistake of law. Or he may be mistaken about the factual circumstances in which he is acting.

In most contexts of alleged criminal conduct a mistake of law does not excuse. But in many of these situations we may be willing to say that a person is at fault for failing to inform himself of the law. If a defendant claims that he was unaware that killing his father out of greed was a crime, we could say that, given the community's conviction that such conduct is morally inexcusable, all members of the community are put on notice that this conviction is likely to be embodied in the law. We may not feel that it is particularly unfair to impose on people the duty to find out whether acts which are commonly regarded as immoral are also illegal.

But when the act is not commonly regarded as immoral within the community, ignorance of the law should be a defense if one accepts the notion of fault as comprehending only standards of

reasonableness. As an example, take the case of Lambert v. California where the defendant was convicted for failing to register with the sheriff's office pursuant to an ordinance requiring ex-convicts to so register within five days of arrival in the city. If we apply the standard of reasonable care in this situation, Mrs. Lambert's defense that she was unaware of the law ought to be a defense. No one would regard residing in Los Angeles as an intrinsically immoral act - that is , one that is so disapproved by the community that a resident should have reason to believe that conditions of residence have been regulated by this kind of criminal statute. But the ordinance in effect imposes a duty on new entrants to make a complete survey of the statutes within five days of entrance. Yet it is inconceivable that the community would regard failure to do this as a manifestation of moral fault. Thus conviction of Mrs. Lambert, assuming the truth of her ~~xxxxxxx~~ defense, would be an instance of true strict liability.

The conviction was reversed but on muddled grounds which seem to have something to do with the fact that Mrs. Lambert's offense was an omission. But, as Packer points out,[6] the reasons for allowing mistake of law as a defense in these cases apply equally to cases where the statute commands restraint. The example is the newcomer in a town who is unaware of a law making it illegal to place garbage cans on the sidewalk between 9 A.M. and 7P.M. Since there is nothing intrinsically immoral about such conduct, shouldn't ignorance of the law be a defense here as well?

---

6. Packer,"Mens Rea and the Supreme Court", 62 S.Ct. Rev. 107 (1962)

This would be regarded by Lady Wootton as an attempt to revive the distinction between actions which are mala in se and those which are mala prohibita; she considers any such attempt futile:

> (T)he badness even of those actions which would most generally be regarded as mala in se is inherent, not in the physical acts themselves, but in the circumstances in which they are performed... The physical act of stealing merely involves moving a piece of matter from one place to another: what gives it its immoral character is the framework of property rights in which it occurs. Only the violation of these rights transforms an inherently harmless movement into the iniquitous act of stealing.
>
> ...
>
> One is indeed tempted to suspect that actions classified as mala in se are really only mala antiqua - actions, that is to say, which have been recognized as criminal for a very long time. [7]

It seems to me that Lady Wootton may have turned things around - rather it is probable that actions which are mala antiqua are always mala in se, but that actions which are mala in se are not necessarily mala antiqua. What we now regard as theft may have been considered wrong long before property rights were legally defined. But this is not to say that the badness is inherent in the physical act; of course the badness derives only from the circumstances of the act. But the circumstances which lead one to say that an action is wrong are not, as Lady Wootton seems to think, limited to those in which moral norms have been embodied in legal norms.

Most "strict liability" statutes do not allow ignorance of

---

7. Wootton, Crime and the Criminal Law, pp.42-43.

the law as a defense. In cases where an act (or an omission) is not regarded as immoral in the community failure to allow the defense does result in the imposition of true strict liability - that is, liability in situations where the community would not regard the defendant as morally at fault since a duty to inform oneself of the existence of such laws would be an unreasonable one by the community's own standards.

The second group of defenses which are often not allowed under strict liability statutes are those involving mistakes of fact. To take Regina v. Prince as an example, is there any sense in which we can say that the defendant was morally at fault, assuming the truth of his claimed defense that his belief that the girl was over age was reasonable. Community standards in this situation may require that he do more than just surmise her age from her appearance or take her word for it, but assume he had other reasons to believe the girl was over age - he had seen her driving a car, etc. In this case how can we say that Prince was at fault? He had control over the consequences in one sense - that is, he could have refrained from indulging in any sexual activities at all, or at least he could have limited himself to the middle-aged club. But it would be extremely peculiar to say that the defendant was at fault because he failed to do this. For if he was at fault, then so is the man who reasonable believes that a girl is over age when the girl turns out to be in fact over age. These two men are in exactly the same moral position; yet no one would say that the second man was at fault.

The argument is frequently made that Prince was at fault because he did have mens rea on the assumption that all sexual intercourse outside marriage is illegal. The defendant then intended to commit an illegal act. Following this argument, the statutory rape cases would be distinguished from the bigamy cases or the cases involving sales of liquor to minors, since in the latter cases there is no intent to commit an illegal act. But this argument is fallacious. If it were accepted, then the man who shoots at the deer before the opening of hunting season, but who kills a man when the bullet ricochets off a rock, is guilty of homicide although he may have had no reason to believe that there was anyone within miles of the area.

In some situations the standard of what constitutes reasonable care may be stricter than in others since "reasonableness" takes content from the kind and likelihood of risks involved in an activity. We expect an airplane manufacturer to exercise much more care than we expect of other manufacturers, but in all cases the standard of reasonableness should be based on the community's notions about when it is proper to direct moral criticism at the actor.

The test here for true strict liability is essentially a test which imports into the criminal law a notion of negligence which is for the most part confined to the civil law. This is the minimum standard for saying that someone is morally at fault.

The question then becomes, why are we concerned with retain-

ing moral fault as a prerequisite to a finding of criminality? In terms of the various aims of the criminal law, what would be the result of abandoning the requirement of fault?

Many writers[8] have pointed out that strict liability doesn't serve a useful purpose to the extent that the criminal law is retributive. If the point of punishment is to express the moral outrage of the community, then there is no point in punishing those who are not morally at fault by community standards. In fact, strict liability weakens the effect of punishment, and therefore of the criminal law, when it punishes those who are morally innocent.

It seems that there is also no place for strict liability if criminal law is to serve a rehabilitative or specific-deterrent function, for both of these are directed at preventing recidivism. But what would we be trying to prevent a repetition of in situations involving defendants who admittedly exercised reasonable care? To hold the individual for treatment or preventive purposes would in effect be in order to treat him for having acted reasonably or to prevent him from committing acts which any reasonable man, by hypothesis, might commit.

The difficult problems arise when one considers the general deterrence function of the criminal law, for it is arguable that strict liability statutes have a greater deterrent effect than ordinary criminal statutes in at least two respects. For example,

---

8. Hall, General Principles of Criminal Law, Chapter 10; Packer, op. cit.; Hart, "The Aims of Criminal Law", 23 Law and Cont. Prob. 401 (1958); Edwards, Mens Rea in Statutory Offenses (1955).

take strict liability for sales of liquor to persons under 21. First of all, this may deter bartenders from selling to anyone under 30; secondly, it may discourage people from engaging in the activity which opens the door to exposure to liability under such statutes.

Assuming that there is such a deterrent effect, is strict liability then justifiable with respect to at least some of the more dangerous activities? Wasserstrom[9] argues that this should be decided on a utilitarian basis by asking whether the effect in added deterrence of undesirable consequences is outweighed by the effect of deterring desirable activity. Certain consequences may be so bad that the need to prevent them may override the undesirable effect of punishing those who might in some sense be "innocent".

Use of a utilitarian test in deciding whether strict liability should be imposed wouldn't lead to a vast increase in the number of strict liability statutes; rather it would probably eliminate many of the statutes which are presently in effect. First of all, the utilitarian would have to take into account the fact that most people regard it is unfair to punish individuals who are morally blameless. Secondly, strict liability would have to be confined to a very few areas, for if it became the rule rather than the exception to hold people responsible for harm which they could have prevented only by taking extraordinary measures, the resulting insecurity would lead to an intolerable situation.

---

9. Wasserstrom, op. cit.

take strict liability for sales of liquor to persons under 21. First of all, this may deter bartenders from selling to anyone under 30; secondly, it may discourage people from engaging in the activity which opens the door to exposure to liability under such statutes.

Assuming that there is such a deterrent effect, is strict liability then justifiable with respect to at least some of the more dangerous activities? Wasserstrom[9] argues that this should be decided on a utilitarian basis by asking whether the effect in added deterrence of undesirable consequences is outweighed by the effect of deterring desirable activity. Certain consequences may be so bad that the need to prevent them may override the undesirable effect of punishing those who might in some sense be "innocent".

Use of a utilitarian test in deciding whether strict liability should be imposed wouldn't lead to a vast increase in the number of strict liability statutes; rather it would probably eliminate many of the statutes which are presently in effect. First of all, the utilitarian would have to take into account the fact that most people regard it is unfair to punish individuals who are morally blameless. Secondly, strict liability would have to be confined to a very few areas, for if it became the rule rather than the exception to hold people responsible for harm which they could have prevented only by taking extraordinary measures, the resulting insecurity would lead to an intolerable situation.

---

9. Wasserstrom, op. cit.

So it seems fair to assume that using a utilitarian test, strict liability would be confined to a few activities which create a substantial possibility of very serious harm.

Many people would reject Wasserstrom's utilitarian test on the ground that it is "unfair" to punish someone who is blameless merely for the purpose of deterring others. Unfairness has always been the primary objection to strict liability statutes, but no one has tried to articulate why it seems unfair. Perhaps it is because it violates the Kantian principle that no individual has the right to use another individual merely as a means to something else; people are to be treated as ends, never as means. Or perhaps it violates Ross' principle that there is a prima facie duty to distribute happiness according to virtue. If either of these principles were universally accepted, then questions about strict liability wouldn't ever arise. Although many people do accept one or both of these principles, neither is claimed to be demonstrable (in the sense of derivable from sone other principle which is universally accepted); they are probably regarded by those who hold them as "primitives". But if this is the case, then we seem to have reached an impasse to any further discussion about the desirability of strict liability statutes.